

3:08cv517
(3:07cr277)

Respondent.

On December 3, 2007, a grand jury charged Petitioner with solicitation to commit murder-for-hire, in violation of 18 U.S. C. § 373, and with using interstate facilities in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958. (Case No. 3:07cr277, Doc. No. 5: Indictment). On April 22, 2008, a trial jury convicted him of both charges. (Case No. 3:07cr277, Doc. No. 42: Jury Verdict). On September 26, 2008, the Court sentenced Petitioner to 210 months' imprisonment and entered judgment on October 14, 2008. (Case No. 3:07cr-277, Doc. No. 57: Judgment). Petitioner timely filed a direct appeal (Case No. 3:07cr277, Doc. No.

55: Notice of Appeal), which is pending (4th Cir. Case No. 08-4998). The instant Rule 60(b) petition was signed and filed on January 23, 2009.¹ (Doc. No. 4).

A defendant may not attack a criminal conviction using the Rules of Civil Procedure. United States v. Leake, 96 F. App'x 873 (4th Cir. 2004) (citing United States v. O'Keefe, 169 F.3d 281, 289 (5th Cir. 1999) and United States v. Mosavi, 138 F.3d 1365, 1366 (11th Cir. 1998)), see also United States v. Breit, 754 F.2d 526, 530 (4th Cir. 1985) (there is no provision similar to Fed. R. Civ. P. 60(b) in effect for federal criminal cases). Additionally, the filing of a notice of appeal ordinarily divests the district court of jurisdiction over a case. United States v. Wooden, 230 F. App'x 243, 244 (4th Cir. 2007). However, Rule 4 of the Federal Rules of Appellate Procedure details exceptions for certain motions. Rule 4(a)(4)(A)(vi) allows a district court to decide a Fed. R. Civ. P. 60 motion when filed not later than 10 days after judgment is entered in a civil case. Rule 4(b)(3) governs appeals in criminal cases and does list Fed. R. Civ. P. 60 motions as remaining within the district court's jurisdiction. Thus, the Court does not have authority to consider the instant petition.

Even if Fed. R. Civ. P. 60 motions continued to be in the Court's jurisdiction in underlying criminal case,² the instant petition was filed more than ten days after entry of the judgment. Therefore, it was untimely. United States v. McKelver, 225 F. App'x 185, 186 (4th Cir. 2007) (affirming the dismissal of untimely Rule 60(b) motion in criminal case).

¹ The pleadings in this case are signed "David A. Willis/EM POA." Considering Petitioner's confinement in Petersburg, Virginia, it is unlikely that he personally signed the documents which were filed in Charlotte, North Carolina on the same day. <http://www.bop.gov/iloc2/LocateInmate.jsp> (search Register No. 21465-058).


² Although the petition and amended petition were filed as pleadings in the civil case (Doc. Nos. 4 and 5), they seek relief from the judgment entered in the criminal case.

IT IS, THEREFORE, ORDERED that Petitioner's Petition for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b) (Doc. No. 4) and his Amended Petition (Doc. No. 5) are **DENIED**.

IT IS FURTHER ORDERED that Petitioner's related motions (Doc. Nos. 8, 9, 10, and 15) are rendered moot by the issuance of this Order.

The Clerk is directed to serve a copy of this Order on the United States Attorney's Office, the United States Marshals Service, and David Willis, c/o 19366 Makayla, Cornelius, North Carolina 28031 and Reg. No. 21465-058, FCI Petersburg Low, Federal Correctional Institution, P.O. Box 1000, Petersburg, Virginia 23804, and document such action.

Signed: September 30, 2009


Robert J. Conrad, Jr.
Chief United States District Judge

